OGC 70-0531

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 14,241

EERIK HEINE,

Appellant,

v.

JURI RAUS,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

BRIEF FOR APPELLANT

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V. The Court Erred in Granting Summary Judgment for the Defendant By Resolving And Ignoring Factual Issues, Including Credibility, And By Failing to Consider the Record as a Whole in the Light Most Favorable to Plaintiff as Required by Rule 56.

VI. The District Court Erred In Not Determining The Nature And Source Of The Prior Authorization Of The Unknown Person Who Directed Defendant Raus To Make The Slanderous Statements And The Court Erroneously Found That The Conduct Complained Of Was Authorized By The Subsequent Ratification After The Suit Had Been Instituted By The Deputy Director Of The CIA.....

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JURISDICTIONAL STATEMENT

The jurisdiction of the United States District Court for the District of Maryland is vested in said Court by Title 28, United States Code, Section 1332(a)(2). The jurisdiction of the United States Court of Appeals for the Fourth Circuit to review the Order of the United States District Court for the District of Maryland entering a final summary judgment for the defendant is vested in Title 28, United States Code, Section 1291.

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STATEMENT OF THE CASE

This appeal follows a remand by this Court to the United States District Court for the District of Maryland in appeal no. 11,195 in which this Court vacated the summary judgment entered by the District Court in favor of the defendant in plaintiff's slander action and remanded the case for possible further proceedings. Prior to the previous appeal, the District Court had entered a summary judgment on behalf of the defendant in the plaintiff's slander action on the ground that the utterances complained of by the plaintiff and made by the defendant were protected under the doctrine of immunity from civil suit accorded to government officials making allegedly defamatory statements within the course and scope of their government employment. The District Court had found that the statements complained of had been made on behalf of and at the direction of the Central Intelligence Agency. This Court found that on the record presented to it in the previous appeal, there was still a permissible inference that the instructions to the defendant might have been given by an unauthorized underling and that this action had never had the approval of a responsible official of the Central Intelligence Agency "having authority to issue or approve such instructions." 399 F. 2d 791 This Court held that if the plaintiff represented to the District Court serious reliance upon the inference, further inquiry might be had and additional findings made. This Court stated that "the inquiry should be directed to the identity of the official within the Agency who authorized or approved the

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instructions to (Raus) the defendant. Disclosure of the identity of the individual who dealt with (Raus) the defendant is not required; the answer to be set is whether or not the Director or a Deputy Director or a subordinate official, having authority to do so, authorized, approved or ratified the instructions. If such disclosures are reasonably thought by the District Judge to violate the claimed privilege for state secrets, they may be made in camera, to that extent."

399 Fed 791

STATEMENT OF QUESTIONS INVOLVED

1. Whether the trial court was justified in re-entering the summary judgment after remand by this Court, when the identity of the person directing the defendant to make the slanderous statements was neither established in accordance with the testimonial requirements of Rule 56(e) F.R.C.P., nor was the statutory or immediate authority of such unknown person established in any greater depth than in the previous record upon which this Court remanded the case for further inquiry.

2. Whether the trial court was justified in re-entering the summary judgment after remand by this Court, in reliance upon the purported ratification by Mr. Helms of the slanderous statements by the defendant Raus, either by Helms as the Deputy Director or as the Director of the CIA, when said supposed ratification came only after institution of the plaintiff's slander suit and with knowledge by Mr. Helms of the pendency of said slander suit.

3. Whether the trial court was justified in re-entering

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the summary judgment after remand by this Court, when the inquiry directed by this Court on remand respecting the permissible inference that the instructions to the defendant Raus might have been made by an unauthorized underling, necessitated the trial court in resolving genuine factual issues, including credibility, and making findings of fact on which to make a re-entry of the latest summary judgment.

4. Whether the Court, which had required plaintiff, who sought to take the deposition of the Director of the Central Intelligence Agency, to outline in question form the general areas of inquiry of the deposition, erred in not allowing the deposition following the submission of answers in written form by the CIA Director and thereafter, upon the Court's termination of plaintiff's discovery, re-entering summary judgment in favor of defendant.

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STATEMENT OF FACTS

The facts proceeding the institution of the present action for general and punitive damages for slander as well as the initiation of the present complaint and the proceedings below in the District Court prior to the first appeal in this action appear in the Statement of Facts in the Appellant's Brief filed in this court in Appeal No. 11,195.

A. Proceedings in the United States Court of Appeals for Fourth Circuit in No. 11,195

This court vacated the summary judgment entered for the defendant by the District Court and remanded this case on the ground that there was a permissible inference in the record before it "that the instructions (to Juri Raus to speak of the plaintiff as he did) were given by an unauthorized underling and that his action has never had the approval of a responsible official of the Agency having authority to issue or approve such instructions". 399 F.2d 785 (1968).

The Fourth Circuit further stated:

> . . .if the plaintiff represents to the District Court serious reliance upon the inference, further inquiry may be had and additional findings made. The inquiry should be directed to the identity of the official within the Agency who authorized or approved the instructions to Raus. Disclosure of the identity of the individual who dealt with Raus is not required; the answer to be sought is whether or not the Director or a Deputy Director or a subordinate official, having authority to do so, authorized, approved or ratified the instructions. at page 790

B. Proceedings in the District Court after Remand

On January 11, 1969, plaintiff filed a statement with the Court representing to the District Court serious reliance upon the inference referred to in the Opinion of the Fourth Circuit,

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and the plaintiff requested that further inquiry may be had into said inference and that additional findings be made.

Thereupon, a preliminary informal conference held by the District Court on February 10, 1969 with counsel for the parties and for the government. Plaintiff requested that he be permitted to take the deposition of the Director of the Central Intelligence Agency under the supervision of this Court in order to establish the factual basis for the inference. Counsel for the defendant exhibited an affidavit of Richard Helms, dated February 10, 1969, at the conference together with a proposed Motion for Summary Judgment. The Court reviewed the Helms affidavit to qualify questions raised by certain statements therein.[1] Counsel for the defendant and for the government agreed to request the Director of the Central Intelligence Agency for a further affidavit to clarify the questions raised by the Court. It was agreed that the plaintiff would not be required to file a responsive pleading to defendant's Motion for Summary Judgment until such time as the inquiry directed by the Court of Appeals was concluded.

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[1]The Court suggested that answers to the following questions in a further affidavit by Mr. Helms would clarify the statements made by him in his affidavit of February 10, 1969:

Q.1. Was the counterintelligence officer referred to in the second sentence of Paragraph 4 one of the counterintelligence officers referred to in the first sentence of Paragraph 4?

Q.2. If the answer to Question 1 is No, did the counterintelligence officer referred to in the second sentence of Paragraph 4 act on -

(a) the conclusion reached by the officers referred to in the first sentence, or

(b) information supplied by the officers referred to in the first sentence, and his own conclusion thereon; or

(c) other information which he possessed; or

(d) combination of two or more of (a), (b), and (c)?

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Upon discussion as to the nature of the questions sought to be put to Richard Helms on deposition by the plaintiff, the Court directed that the plaintiff reduce the general areas of his questions to writing so that more careful consideration could be given to them by the proposed deponent and by the Court.

Thereafter, on February 15, 1969 the defendant filed a Motion for Summary Judgment, together with points and authorities and a supporting affidavit by Richard Helms dated February 10, 1969. On March 19, 1969, plaintiff submitted for consideration thirty-five (35) questions in writing covering the general areas on which he proposed to depose Richard Helms. On April 3, 1969, defendant filed objections to each and every one of the proposed questions, and on the same day, an additional affidavit from Richard Helms was filed, dated April 3, 1969, supplementing his previous affidavit of February 10, 1969. The United States filed a Statement on behalf of the Director and the Central Intelligence Agency conerning the questions proposed by the plaintiff to Richard Helms, advising the Court that the United States would await the ruling of the Court as to whether any of the proposed questions would be allowed, and if so, that a later determination be made as to whether or not it would be necessary for the Director of the Central Intelligence Agency to make an official claim of privilege on the ground of secrecy with respect to any of the information sought to be elicited through said questions.

On June 6, 1969, this cause came on to be heard at a formal hearing upon objections of the defendant to certain general questions which the plaintiff proposed to develop at a deposition

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of Richard Helms before this Court. The Court considered the plaintiff's questions seriatum and heard arguments of counsel thereon. Thereupon, subject to a further report from the United States as to whether the Director of the Central Intelligence Agency would file a claim of privilege against the disclosure of state secrets with respect to any of the proposed questions, and reserving ruling on the claim of privilege as to each of said proposed general questions.[2]

Thereafter, on July 16, 1969, the Court received a letter from J. Walter Yeagley, Esquire, Assistant Attorney General of the United States, advising the Court that the United States strongly opposed the suggestion that a deposition upon oral examination be taken of the Director of the Central Intelligence Agency, and further advising the Court that subject to the claim of privilege, the Director would respond in writing to the questions which the Court ruled to be relevant. On September 29, 1969, Director Richard Helms responded in writing and under oath to all of the questions allowed by the Court. To three questions Mr. Helms made partial answers to questions (3), (5), and (12),

[2]The Court ruled that some of the plaintiff's general questions ((3), (4), (5), (9), (12), (15), (16), (17), (18), (19), (20), (21), (22), and (29)) were within the inquiry directed under the remand of the Court of Appeals. The Court stated that two Questions ((13) and (14)) were to be re-examined in the light of any response which the Director might make to the general area of questioning in response to general question number (4). Defendant's objections to the remaining questions ((1), (2), (6), (7), (8), (10), (11), (22), (23), (24), (25), (26), (27), (28), (30), (31), (32), (33), (34), and (35)) were sustained.

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and he formally asserted the privileged status of further answer to said questions and declined to give further information to the same pursuant to the authority vested in him as Director of Central Intelligence. All other questions were answered without any claim of privilege.

The District Court held the final hearing on October 17, 1969 in which the plaintiff urged the Court to permit the taking of Mr. Helms' deposition so that the Director could be cross-examined both on the statements and answers in which he claimed privilege and also on the questions where privilege was not claimed. Plaintiff specifically requested an opportunity to cross-examine Mr. Helms and to develop further information on the statements made by Mr. Helms in his most recent affidavits as well as his answers to interrogatories on the matters of his (Helms) ratification of the defendant's conduct in December of 1964, the prior authorization and authority under which Raus was given the instruction to slander the plaintiff, the precise nature of the instruction which was given to the defendant Raus and further clarification on this identity and authority of the person instructing the defendant Raus. The defendant argued that the claims of privilege made in the answers to the written interrogatories would have to be sustained on oral deposition and that the Director had given all of the information which could be obtained in his affidavits and answers under oath.

Subsequently on November 3, 1969, the Court directed that summary judgment be re-entered in favor of the defendant against the plaintiff and the District Court rendered an opinion holding

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that Helms' claim of privilege must be sustained under the rule announced in United States v. Reynolds, 345 U.S. 1. The Court held that the Director's affidavit supported by his answers to the interrogatories, shows:

(a) that the instructions to Raus were given by a subordinate official of the Agency, authorized to do so, and acting in the course of his prescribed duties and not by an unauthorized underling; and

(b) that Helms, as Deputy Director of the Agency in December, 1964, was authorized to and did ratify and approve the action taken by the counterintelligence officer who instructed Juri Raus to warn members of the Estonian emigre groups that Eerik Heine was a Soviet intelligence operative, a KGB agent.

This appeal followed.

SUMMARY OF ARGUMENT

I. The Court erred in granting a summary judgment for defendant when the affidavits in support thereof did not meet the testimonial requirements of Rule 56(e).

II. The Court erred in not permitting the plaintiff to take the deposition of Mr. Helms when the record on which the Court entered the final summary judgment contained six affidavits which had been made by Mr. Helms together with answers to 14 questions under oath by him, none of which were subjected to any testing by cross-examination.

III. The Court erred in allowing the government to decline to answer questions on the ground of secrecy, without first making an appropriate inquiry (as required by the standards set forth in United States v. Reynolds) into the possibility of executive caprice.

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IV. The Court erred in failing to follow the mandate of the Court of Appeals and consider the answers to any questions in which privilege had been claimed, in camera, as directed by the Court of Appeals.

V. The Court erred in granting summary judgment for the defendant when the record indicates the existence of genuine issues of fact concerning material matters, and the Court erred in resolving general factual issues, including credibility, and the Court failed to consider the inferences drawn from the underlying facts contained in the record in the light most favorable to the plaintiff who is opposing the motion.

VI. The District Court erred in not determining the nature and source of the prior authorization of the unknown person who directed defendant Raus to make the slanderous statements and the Court erroneously found that the conduct complained of was authorized by the subsequent ratification after the suit had been instituted by the Deputy Director of the CIA.

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ARGUMENT

I.

The Court Erred In Granting A Summary Judgment For The Defendant Upon Affidavits Which Did Not Meet The Testimonial Requirements Of Rule 56(e) of F.R.C.P.

Plaintiff had most strongly urged this Court in case 11,195 that the granting of summary judgment upon affidavits of Helms and fragmentary testimony of defendant Raus had been violative of Rule 56(e) of the FRCP which requires that affidavits shall set forth facts as should be admissible in evidence.

The District Court held that the affidavits satisfied the Court that defendant Rausewas a government employee working within the scope of his employment and thus when he slandered the plaintiff was immune from suit under the doctrine of Barr vs. Matteo, 360 US 564 (1959) which had extended absolute immunity, recognized to reside in federal officers of cabinet rank, to "officers of lower rank in the executive hierarchy".

The affidavits in support of the motion for summary judgment in addition to the affidavits heretofore filed, did not meet the testimonial requirements of Rule 56(e), FRCP. The remand from this Court to the District Court for a specific inquiry did not in any way limit the discovery procedures, but, in fact, specifically stated that there must be a finding by the District Court that the person who authorized and instructed defendant, Juri Raus, to make the slanderous statements of the plaintiff, possessed the requisite authority in his position as an officer of the Central Intelligence Agency to issue or approve

399 F-2d 781

Decision of this case reported as Heine v. Raus, 399 F.2d 785
Rule 56(e) line 41-line 46 to the period.
360 US at 573

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such instruction. In light of this Court's concern for a specific finding in this area, it was incumbent upon the defendant to set forth with specificity, facts to require omission.

After remand to the District Court, but prior to discovery proceedings being instituted by the plaintiff solely in the form of a requested deposition of the CIA Director, Richard Helms, the defendant filed affidavits of a conclusory nature purporting to foreclose further discovery by supplying the information required by the remand. The affidavits filed herein of February 10, 1969 and April 2, 1969, were a reprise of those heretofore filed and, like the prior affidavits, were wholly inadmissible as evidence in that they were narrowly drawn and unrevealing as to material facts required to be presented on the remand from this Court. In paragraph 4 of the affidavit of February 10, 1969, Director Helms cavalierly decided in conclusory fashion, without producing a single material fact, the ultimate question of the remand. He stated:

> "In the performance of his assigned counter-intelligence functions the counter-intelligence officer responsible for safeguarding sources of intelligence developed within the Estonian emigre groups, acting in accordance with his prescribed duties, instructed Juri Raus to warn members of the Estonian emigre group that Eerik Heine was a Soviet intelligence officer, a KGB agent."

No new fact is contained in this affidavit. We do not know whether the counter-intelligence officer who supposedly instructed Raus had ever previously or subsequently instructed anyone to do what supposedly was the instruction of Juri Raus, to slander the plaintiff in this case. Nor are we informed as to whether there was a CIA procedure established whereby authority or permission would be obtained from other officers in order to permit a highly

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399 F.2d at 791.

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publicized defamation, so anomalous to the intelligence-gathering agencies defined statutory function.

None of the facts which should be available to the plaintiff in determining the truth are contained in these affidavits and the defendant attempted and succeeded in achieving by affidavit what obviously would be stricken from the record in an actual trial.

Even if the affidavits did contain facts and not conclusions, raw material and not a statement of the ultimate matter to be determined, the lack of cross-examination renders them totally inadmissible in support of the motion for summary judgment. In an actual trial, if the author of the affidavits, Richard Helms, CIA Director, took the stand and recited all of the facts in his numerous affidavits and thereafter refused to submit to cross-examination, a trial judge, following the basic and rudimentary testimonial requirements, would be forced to strike all of such testimony in chief.

> "The general rule is that where the witness after his examination-in-chief on the stand has refused to submit to cross examination, the opportunity of thus probing and testing his statements has substantially failed and his direct testimony should be struck out." Wigmore on Evidence, Section 1391, page 112, and cases cited in the footnotes. 133 F.2d at 97. STEPHAN V. UNITED STATES (1943)

It would not have been permitted if in conclusory form in direct examination, since conclusions are the province of a jury and not of a witness except in the rendering of an expert opinion.

The affidavits and the affidavit form of the 14 responses to the proposed areas of inquiry for the deposition requested by the plaintiff were, without cross-examination, all of the same defective character and subject to being struck.

> "United States v. Lester, 2d Cir. 1957, 248 F.2d 239. ...If the witness by invoking the privilege precludes inquiry into the details of his direct testimony

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> evasive, recalcitrant or nonresponsive to questions is an essential in ferreting out facts, particularly of an adverse party or witness."

The proposed deposition of Richard Helms was, in effect, the deposition of an adverse party since the summary judgment originally entered and now re-entered is based almost entirely upon the affidavits of Helms. The final paragraph of the January, 1965 memorandum in opposition to the plaintiff's motion to restrict inquiry to written opposition stated that,

> "The hardship or burden upon the plaintiff must be weighed against the defendant's need adequately to prepare his defense and to avail himself of the discovery prerogatives which the Federal Rules of Civil Procedure accord to him."

Apparently, the Federal Rules of Civil Procedure apply only to the federal establishment and that of its minions, but not to the individual litigant. The Court's rulings in permitting the government to take a 924 page deposition of the plaintiff Heine but in forbidding the deposition of the Director of CIA has been graphically discriminatory. Defendant Raus and the real party in interest, the Central Intelligence Agency, have had their cake and eaten it too. The plaintiff has received only testimonially inadequate crumbs provided by the affidavits.

The Court had volunteered on numerous occasions to conduct the deposition in open court in Baltimore or even to accommodate the Central Intelligence Agency and its Director by travelling to its headquarters in Langley, Virginia. The Central Intelligence

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Plaintiff never has acknowledged that defendant was, at any time, an actual employee of CIA. The defendant and the CIA have cleverly avoided the out-right lie of calling Raus an employee by saying he was employed (used) and by stating that Raus was instructed to state that plaintiff Heine was a Soviet spy rather than saying he was ordered as one would expect a superior to do in effecting such a supposedly urgent life or death assignment.

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Agency and its secrets could have been protected by the Court during the taking of the deposition of the Director, who, among all others, would best be in a position to determine whether divulging an answer to a question would be proper or violative of national security. As each question was asked, there could be a pause to permit the deponent, his attorneys and his staff to demonstrate to the Court sufficient reason why the question should be disallowed. Thus, the plaintiff would not be arbitrarily denied information which might very well lead to information to prove the allegations of his complaint or deny the affidavit of Helms and the facts comprising the defense of Raus.

In all discovery procedures, the deposition tests the credibility of the deponent and in light of the history of this case and the bald-faced lies issued by the defendant, the CIA and Richard Helms, specifically, there was a crying need for a truth-testing deposition. The early memorandum of January, 1965 and the accompanying affidavit avering the absolute necessity for the defendant to take the deposition of the plaintiff stated that the defendant had no financial resources other than his job with the Bureau of Public Roads. Thereafter, at the time of defendant's open court deposition, the CIA submitted information that the defendant had been paid beyond his Public Roads salary directly or indirectly by the Central Intelligence Agency. These two statements, placed in juxtaposition, clearly demonstrate a calculated perjury of Raus and the Central Intelligence Agency. Despite the easy rationalization of the defendant and the CIA of such deception as a pragmatic white lie in the pursuit of national survival, a court must thereafter look with a jaundiced eye at every utterance of such prevaricators purporting to be truth under oath.

Early in the District Court maneuvers of the defendant and

> there may be substantial danger of prejudice because the defense is deprived of the right to test the truth of his direct testimony and, therefore, that witness' testimony should be stricken in whole or in part."

II.

The Court Erred In Not Permitting The Plaintiff To Take The Deposition Of The Director Of CIA Whose Affidavits And Answers To Fourteen Questions, None Of Which Were Subjected To Cross-Examination, Had Been The Support Of Defenant's Motion For Summary Judgment.

The refusal of the Court to permit the deposition of the CIA Director, Richard Helms, was contrary to Federal Rules of Civil Procedure, and sharply discriminatory to the plaintiff - who, himself, early in the litigation, for reasons of economic necessity, had sought to avoid the cost of travel and lodging when the defendant scheduled his deposition away from the plaintiff's home in Canada. At that time, in the defendant's January 10, 1965 memorandum in opposition to the plaintiff's motion that the deposition be taken on written interrogatories, defendant Raus' attorneys stated:

> "It is at once apparent from the breadth and scope of the activities involved that written interrogatories are an inadequate substitute for an oral deposition."

As was further stated by the defendant in his opposition:

> "Even in the ordinary action, it is generally held that oral interrogation is much to be preferred over written interrogatories."

In V. O. Machinoimport v. Clark Equipment Co., 11 F.R.D. 55, 58 (S.D.N.Y. 1951), the Court said:

> "Under ordinary circumstances, the advantages of oral examination over the rigidity of written interrogatories are readily acknowledged. Cross-examination of a witness who may be

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the CIA, we witnessed an almost comical demonstration of the unreliability of the affidavits of Richard Helms and the memorandum in conjunction with the defendant's first motion for summary judgment. It was stated that a disclosure of further information beyond the original affidavit would jeopardize national security; yet, when the first affidavit proved to be inadequate to sustain a summary judgment, the CIA and Richard Helms provided additional information. This occurred a second time ( ). Thus, by further disclosure, the CIA either jeopardized national security or belied the truth of their original averment.

In the proceeding before the District Court subsequent to remand from this Court, the plaintiff was required, prior to taking the deposition of Richard Helms, to submit the proposed areas of inquiry of Director Helms. The plaintiff, despite his chagrin at being deprived of the due process of the FRCP all other litigants operate under, in compliance propounded 35 questions, all of which were objected to. Thereafter, the court ruled that 14 were proper subjects of inquiry as the initial questions in a deposition of Richard Helms. Prior to the establishment of any date for the Helms deposition, the government, through the Justice Department, opposed the taking of the deposition and contemporaneously filed "answers" to those initial areas of inquiry as if they were interrogatories propounded by the plaintiff, which, of course, the plaintiff had never intended. Helms responded to what he had contorted into 14 interrogatories with answers and, in 11 of those answers, did not state that there would be no further information beyond the stated answer.

There would appear to be no reason why there could not have been a further inquiry by deposition along those lines. The Court thereafter stated:

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> "but of course cross-examination by interrogatories is generally an unsatisfactory procedure. It tends to become interminable because an answer to one question leads to another."

The Court at this point again said that:

> "...I am perfectly willing to go to Washington, to Virginia or any other reasonable place where the records are -- I mean any reasonable distance to the court where the records are --"

The Court thereafter sought the further areas of inquiry from the plaintiff, beyond the proposed starting question of deposition. The plaintiff gave several areas of further discovery but the Court never permitted the deposition, took the matter under advisement and without further memorandum or argument on the issue of summary judgment, re-entered summary judgment on behalf of the defendant. The plaintiff was left deprived of cross-examination not only of the Director of CIA subsequent to his original answers, but of the original questions. Of course the plaintiff was deprived of responses to 21 question areas for reasons set forth by the Court or denied without reason. A lack of the deposition crippled plaintiff from seeking truth in a determination of the case.

III.

The Court Erred In Allowing The Government To Decline To Answer Questions On The Ground Of Secrecy, Without First Making An Appropriate Inquiry (As Required By The Standards Set Forth In United States v. Reynolds) Into the Possibility Of Executive Caprice.

After this Court vacated the summary judgment entered by the District Court and remanded this case for possible further proceedings, the plaintiff filed a statement advising the District Court that he placed serious reliance upon a permissible inference that on the present record the instructions, under which the

defendant slandered the plaintiff, were given to the defendant by an unauthorized underling in the CIA and that this action never had the approval of a responsible official of the Agency having authority to issue or approve such instructions.

Defendant's first pleading on remand was a Motion for Summary Judgment fortified by an affidavit of Richard Helms in which he echoed with slight elaboration all of the conclusory statements he had made in his four previous affidavits prior to the first appeal. He also lodged a formal claim of privilege in this affidavit supporting the Motion for Summary Judgment, in which he advised the court that it would be contrary to the best interest of the United States to disclose the identity of the counter-intelligence officer who instructed Juri Raus to issue the slanders against the plaintiff. Subsequently, in the proceedings, as a condition precedent to the taking of Mr. Helms' deposition, the Court directed the plaintiff to submit questions in writing covering the general areas upon which the plaintiff wished to depose the Director. Defendant filed written objections to answering any of the 35 questions (understandably so, inasmuch as at that point in the proceedings, the District Judge was inclined to allow Mr. Helms be deposed on any of the questions where secrecy was not claimed) and upon reviewing the questions, the Court affirmed the government's objections as to 21 of the questions and sustained the propriety of the remaining 14 questions. Before a deposition of Mr. Helms was scheduled, the Director proffered written answers under oath to 14 of the questions as an alternative to the taking of his deposition, and in 3 of the answers, he again lodged a formal claim of secrecy.

The District Court held that the claims of privilege must be sustained under the rule announced in United States v. Reynolds, 345 U.S. 1, 7-8, quoted and followed by the Fourth Circuit in

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Section I of its opinion in this case, 399 F.2d at 788.

The reliance of the District Court on the authority of the Reynolds case to sustain its action in allowing the claims of privilege is ironic, inasmuch as none of the standards set forth in the Reynolds case were observed by the District Judge in the conduct of his proceedings. In each instance in which a bald assertion of the claim of privilege was made by the Director, the Court accepted the same without question. Reynolds held that:

> "In each case, the showing of necessity which is made will determine how far the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate. Where there is a strong showing of necessity, the claim of privilege should not be lightly accepted...." 345 US 1, at 11.

In the instant case, it was objectively evident that there was a strong showing of necessity because proof of all of the contested facts in support of the defendant's affirmative defense of immunity were in the exclusive reach of the defendant and the Central Intelligence Agency. Moreover, Reynolds strongly dictates that "judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers." U.S. v. Reynolds, supra, at 9-10.

A review of the Central Intelligence Agency's intervention in this case from the outset, raises serious questions both as to credibility and executive caprice. The District Court's willingness to accept as credible and uncapricious the repetitive, flat assertions of secrecy by the Agency, without any inquiry or testing by the District Court is a denial of the standards enunciated in Reynolds. When the secrecy claims are weighed against the sworn offerings and pleadings made by the defendant and the Agency from the very beginning of this case, a pattern of

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expeditious and fortuitous use of the secrecy claim emerges as a tactical tool of the government to say just enough, as needed, and always in furtherance and to the advantage of the defendant's and government's position.

At the beginning of the case, when the plaintiff requested that his own deposition be taken either on written interrogatories or that defendant pay his travel expenses (J.A. 27-28), defendant Juri Raus filed an affidavit citing his impecunious circumstances and even itemizing his mortgage and car payments (J.A. 24-27) and thereafter, in less than forty-five days, the defendant suddenly had the resources for his attorneys to take a 924 page deposition of the plaintiff (J.A. 28-29). Another example, the defendant stated in the Seventh Defense of his Answer (J.A. 25) that he was privileged to speak of the plaintiff as he did, since the defendant was acting as an appropriate officer of the Estonian Liberation Movement. However, more than a year later, when the CIA, through its private detectives, one of whom characterized himself as an associate counsel in this case (J.A. 294) were unable to establish any causal connection between the plaintiff, Mr. Heine, and the communist conspiracy, then suddenly it became expeditious to defend this action on the affirmative defense of official immunity rather than on the merits. Then the defendant filed a Motion for Summary Judgment supported by the affidavit of Richard Helms (J.A. 107-108) wherein Mr. Helms stated that the slanders complained of were made by Raus within the scope and course of his employment by the Agency on behalf of the United States. In this same affidavit, Mr. Helms concluded that neither the Agency nor the defendant should make any further disclosures whatsoever regarding the defendant's activities for the Agency in connection with Eerik Heine because it would be contrary to the security interest of the United States.

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This claim of secrecy by Mr. Helms was buttressed by a more august claim of secrecy filed by the then Director of the CIA, Admiral Raborn, and denoted a "Claim of Privilege by the CIA" (J.A.234-35) which claim was filed with the imminence of the deposition of Juri Raus. The deposition of Juri Raus was frequently and repeatedly stilted and truncated with the intervention of the claim of secrecy to specific questions, all of which were upheld by the Court (J.A.238-258). In a highly unusual proceeding, one of defense counsel placed the other on the stand and defense counsel stated on cross-examination (J.A.117-168) that the CIA had forbidden defendant to use the defense of immunity but that after receiving the lengthy list of interrogatories from the plaintiff, the defendant was allowed to file the defense of official immunity, but that the reason for this change of position by the CIA was unknown to the defense counsel.

As the case progressed toward the first appeal, the credibility-caprice gap widened with rushing speed. Although both Mr. Helms and Admiral Raborn had lodged the most formal claims of secrecy and self-imposed prohibitions against the disclosure of any further information whatsoever, nevertheless, as the needs of the case required, Mr. Helms was able to ignore his self-imposed prohibition and offer a further affidavit on October 7, 1966 (J.A. 36) .

In an absolutely incredible move, Thomas J. Kenney, the United States Attorney for the District of Maryland, offered an affidavit by Mr. Lawrence Houston, general counsel of the Central Intelligence Agency, which incorporated by reference to pertinent paragraphs in a document classified "Secret", and which could not be de-classified for the purpose of this case, but which Mr. Houston requested the Department of Justice to submit

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to the Court under seal for in camera inspection and which counsel now of record for the plaintiff and defendant could see but could not copy (J.A. 346-347). This offering was made in the face of the subsisting, unrevoked claim of secrecy by Admiral Raborn. In addition, Mr. Houston filed a memorandum concerning the legal authority of the CIA (JA. 301-305). The offer to view the purportedly secret documents was declined by counsel for the alleged KGB agent (J.A. 318-319).

It is from this background in the case that upon remand, the District Court accepted without question both the conclusory statements of the CIA and the claim of secrecy so that any meaningful inquiry by the plaintiff within the scope of the remand was foreclosed.

IV.

The Court Erred In Failing To Follow The Mandate Of The Court Of Appeals And Consider The Answers To Any Questions In Which Privilege Had Been Claimed, In Camera, As Directed By The Court Of Appeals.

Implicit in the Opinion of this Court, is that in the event the CIA made a formal claim of secrecy in the course of the proceedings on remand, the District Judge would ascertain whether the claim of secrecy was well taken, and if so, would thereafter conclude the inquiry directed by this Court, in camera. This Court directed that:

> "...the answer to be sought is whether or not the Director or a Deputy Director or a subordinate official, having authority to do so, authorized, approved or ratified the instructions. If such disclosures are reasonably thought by the District Judge to violate the claimed privilege for state secrets, they may be made in camera, to that extent." (399 F.2d at 781)

In Mr. Helms' affidavit of February 10, 1969, and in his answers

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under oath to questions Nos. 3, 5 and 12, after making partial conclusory statements and answers, he concluded with a claim of secrecy which foreclosed any additional inquiry on the matters about which he made answer and affidavit. The matters about which he claimed secrecy were precisely the matters to which this Court directed the inquiry on remand. Not only did the District Judge unquestionably accept the claim of secrecy, but he did not make an in camera exploration of the answers sought as anticipated and directed by this Court. This error requires summary reversal as a failure to make an inquiry consistent with the direction of this Court on remand.

V.

The Court Erred In Granting Summary Judgment For The Defendant By Resolving And Ignoring Factual Issues, Including Credibility, And By Failing To Consider The Record As A Whole In The Light Most Favorable To Plaintiff As Required By Rule 56.

Viewing the Helms affidavits of February 10 and April 7, 1969 together with his gratuitious written answers to what plaintiff had filed as notice to Helms of areas of inquiry for deposition, in a light most favorable to the plaintiff as required by Rule 56, there is a failure by the defendant to show that there exists no issues of fact as to material matters which are in dispute.

The remand to the District Court sought, among other facts, a determination of the authority of the person who instructed Raus. The present record of this unidentified person's authority is limited to the currently filed conclusory statements of Helms. These conclusory offerings in no way factually enrich the previous record on which this Court reversed the summary judgment. No

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specificity is given as to identity of the "instructor to defame", the scope of his duties or his statutory authority.

The sheer proliferation of affidavits by Helms together with the gratuitious and sundry offerings of the C.I.A. (sworn answers under oath, a filing as to the statutory authority of the C.I.A., secret papers to be seen by counsel but not the parties), all filed with concurrent protestation of secrecy which foreclose cross examination, not only violate the purpose of Rule 56, but must surely test the credulity of the Court, and therefore, make credibility itself, an issue.

A review of the "answers" of September 29, 1969, by Richard Helms, illustrates the gaping holes in the body of proof relied upon to support the Motion for Summary Judgment. The Director's response to question No. 3, seeking the assigned function and prescribed duties of the counterintelligence officer who supposedly instructed Juri Raus to make statements against Eerik Heine, states only that the officer's function and duties were to safeguard the Agency's intelligence sources developed within the Estonian emigre groups, a general answer which nowhere within it contains the specific power or authority of the said counterintelligence officer to instruct anyone to make statements of a slanderous nature about the plaintiff.

The authority of this counterintelligence officer or any intelligence officer to initiate action to have public statements made against the plaintiff was the subject of inquiry of question No. 5, particularly with regard to the statutory authority, the public laws of the United States, which provided the authority

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for such action by a CIA officer. The answer again makes a conclusory statement that the officer who instructed Juri Raus had the responsibility of safe-guarding sources of intelligence but at no time states that there is any statutory authority for this officer or any other officer of the Central Intelligence Agency to direct defamation. In a Motion for Summary Judgment, we must conclude therefore that there was an absence of statutory authority permitting the Central Intelligence Agency, an intelligence-gathering entity, to make public pronouncements in the United States.

The response to question No. 12 provides the information that the counterintelligence officer in question was a full-time staff employee of the Agency and was covered by the provisions of the Civil Service Retirement Act. This fact in and of itself does not confer upon the said officer any authority whatsoever. However, it is interesting to note that it is in stark contrast, as simple expository description, to the contorted characterizations throughout the entire proceedings of this case, of the defendant Raus, himself, who has never been called an employee of the Agency and about whom no information has been received with regard to salary, pension, disability, or retirement.

By the relevation of these fragmentary facts about the counterintelligence officer, a Court, in a summary judgment proceeding, must look with grave suspicion upon the status of defendant Raus himself, vis-a-vis the counterintelligence officer and the Central Intelligence Agency. Raus has been characterized as the most subordinate level of government (not CIA) employee

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whose cover has been blown by this case, whose future utility by the Central Intelligence Agency has been materially if not totally diminished. Yet, he has never been called an employee, full-time or part-time, and we know nothing about the method of payment or whether he receives or whether he is under any retirement program of the Agency. Yet the unknown, unnamed, still-operative counter-intelligence officer who supposedly instructed Raus is revealed as a full-time employee under Civil Service retirement.

If Raus was not an employee and not under disability or retirement of the Civil Service or the General Central Intelligence Agency retirement and disability system, despite whatever statutory power existed in the Agency to issue public statements of slander, (although we have had no statutory authority stated) and whatever authority was in the hands of the individual counter-intelligence officer, (which power is ill-defined and at no point specific) we have nothing to inform us that Raus was a person who could be ordered as the last link in the chain to the organization, to make defamatory statements and therefore, we must conclude that he is not a person who is capable of obtaining derivitive immunity.

The opinion of this Court in Heine v. Raus, 399 F.2d 785 cites several examples of derivitive immunity, but in all of them the final link in the chain, the most subordinate employee, was acting under directions and orders of a duly-authorized superior, whom he could disregard or disobey without jeopardy to his position or threat to his employment status.

From the beginning of the proceedings in this lawsuit, the

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defendant and the CIA have had to chart a course between the Scylla of revealing too much and the Charibdis of not saying enough.

They have made a tortuous journey that avoids the outright lie of saying that Raus was an employee of the CIA who was ordered or directed to defame Heine. But, at the same time they put forth claims that Raus was employed and instructed in order to cloak Raus, the volunteer, with the immunity from suit conferred upon government officials acting in the scope of their employment. Barr v. Matteo, supra.

With a favorable Court decision, the defendant Raus and the CIA have completed a safe and successful voyage. But only because its Helmsman was improperly permitted to leak a few advantageous bits of information while holding back the flood gales of truth under something of an unsubstantiated claim of national security requirement.

It might be added that the pre-emptory claim of the require-
ments of national security are not admitted by the plaintiff but have been unquestioned by the Court either in the lens of the public forum or of the in camera inspection

Everyone knows that contrary to what our founding fathers are so often quoted as saying, all men are not created equal. However, the judicial system of our contry has achieved its greatness by treating men as if they were. To permit inequality of treatment to the anti communist freedom fighter, Heine, on the one hand and Raus and the CIA establishment on the other would tarnish the majesty of the American judicial system.

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VI

The District Court Erred In Not Determining The Nature And Source of the Prior Authorization Of The Unknown Person Who Directed Defendant Raus To Make The Slanderous Statements And the Court Erroneously Found That The Conduct Complained Of Was Authorized By the Subsequent Ratification After The Suit Had Been Instituted By The Deputy Director Of the CIA

Ratification

The District Court held on the last page of its Order granting summary judgment under 2(b);

"(b) That Helms as Deputy Director of the Agency in December, 1964, was authorized to and did ratify and approve the action taken by the counterintelligence officer who instructed Juri Raus to warn members of the Estonian emigre groups that Eerik Heinc was a Soviet intelligence operative, a KGB agent."

A striking first thought which the claim of ratification invokes, is why was it necessary to ratify action which supposedly had been authorized at the time of the supposed instruction to defendant Juri Raus. Such averments by Director Helms may be analogized to taking out fire insurance on an absolutely fire-proof building.

First of all we must determine what ratification is and whether the later averments or approval, applause or me-too-ism of CIA Director Helms in December, 1964, constitued legal ratification. As the Supreme Court said in Clews v. Jamieson, 182 U.S. 461, 45 L. Ed., 1183, 21 S. Ct., 845, (1901) in order that ratification shall be effective not only must the transaction originally had been entered into on behalf of the person who subsequently ratified it, but the supposed agent must profess at the time to be acting as such. We have nothing to indicate that the un-named

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substantial grounds; the acceptance of the affidavits which failed to meet the testimonial requirements of 56(e) of the F.R.C.P.; the prohibition of the discovery procedure accorded other litigants, specifically the refusal of the Court to allow the plaintiff to take the deposition of the CIA Director Helms who as a witness would be revealed as a vital source of information or as one whose testimony, untested by cross examination and thus subject to being struck, would be valueless in either deposition or affidavit form as support for the defendant's motion for summary judgment; and by the Court's acceptance of the limited fragmentary data of the Helms' affidavits all of which must be judged on the issues of authorization and ratification, in the best possible light for the plaintiff, as sufficient to deprive the plaintiff of his day in Court and foreclose the opening of a forum for truth. Finally, the Court erred in interpreting late affirmance as legally effective ratification.

CONCLUSION

The summary judgment entered for the defendant should be reversed and the cause remanded to the trial court with directions for a full trial on the merits.

Respectfully submitted,

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Authority of the unnamed counterintelligence agent

We are informed by the Court itself the basis for granting summary judgment on the final page of the Order of the Court.

> 2. The Director's affidavit quoted above supported by his answers to interrogatories, shows:
>
> a. That the instructions to Raus were given by a subordinate official of the Agency, authorized to do so, and acting in the course of his prescribed duties and not by an unauthorized underling;

We have no information as to how the subordinate official was authorized to instruct anyone; whether this authorization was by oral or written directive, his own interpretation of his duties, here say, guess, speculation or whim. We know nothing as to the subordinate's prescribed duties either by job description, past activities, or work thereafter or whether he had previously or did thereafter instruct anyone to slander or make public announcements about other persons besides plaintiff Heine.

The affidavits of February 10, 1969 and April 2, 1969 and the responses to the deposition opening questions lacked the data to demonstrate that inherent potential power resides in this unnamed counterintelligence agent permitting him to order any single subordinate employee of the CIA to defame the plaintiff. Further, the limited information supplied by the defendant reveals nothing with regard to the unnamed counterintelligence agent's relationship with Juri Raus, which conferred the power to require defendant Raus to obey him or the consequences of the failure to obey the "instructions".

In summary, the plaintiff contends that the Court erred in granting the defendant's motion for summary judgment on several

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counterintelligence agent was acting on behalf of the Director or that he so stated to Raus and, what is more important so far as the plaintiff is concerned, there has never been any allegation that Raus ever indicated that he was acting on behalf of the CIA when he spoke or that he had the power to speak for the CIA. In addition, the affidavits of Kuklane (J.A. 130) and Allikas (J.A. 126) would block summary judgment along this line since they specifically state no such representations by Raus at the time he uttered his defamatory words about Heine.

Since the defendant in this case never claimed he was acting on behalf of the CIA or Helms, or the unnamed CIA counterintelligence agent, no act of his is capable of ratification.

In fact there can be no ratification whatsoever of the actions of Raus since as stated in Williston on Contracts (Jaeger), Sec. 278 at page 267, "the anomalous doctrines of undisclosed principal are not extended to the law of ratification." Since there was no disclosure of the principal and no allegation of authority, ratification cannot be considered at all. But even assuming, arguendo, which of course, is directly contrary to the facts of both the plaintiff and the defendant, that Raus had made a statement on behalf of the CIA and stated that he was an agent of the CIA and even if he was an actual employee of the CIA, (significantly a statement never made at any time in the proceeding), the defendant is faced with the fact that the CIA's affirmance or approval of the action of the unnamed counterintelligence agent, and presumably of Raus' statements did not occur until after Heine had suffered the catastrophic

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consequences of the widely publicized defamation for over a period of one year during which time he had sought retraction, retained attorneys, filed suit in the United States District Court and became actively engaged in oppressively expensive litigation. Only then did the CIA acting by opportunistic reflex, nurtured in a philosphy of pragmatism, issue, through Richard Helms what he characterized, in typically unmitigated presumption, a ratification. It was too late. It had no effect upon this case. The Restatement of Agency (Second) quoted by this Court in Heine v. Raus 399 F.2d, 785, at 790, held in Section 89, that if the affirmance of a transaction occurs at time when a situation has so materially changed that it would be inequitable to subject the other party to a liability thereon, the other party has the election of avoid liability and further at section 101, ratification is no effective in diminishing the rights or other interests of persons not parties to the transaction which were acquired in the subject matter before affirmance. In light of the law, there appears to be, unequivocably, absolutely no ratification in the legal sense which would be binding upon the plaintiff in this case. The total absence of legal ratification which was relied upon by the defendant and accepted by the Court as a re-enforcement for an acknowledgedly weak showing with regard to authorization, now focuses the light upon the sole ground for which summary judgment was granted. As has been urged above all of the factors overwhelmingly require a reversal of the judgment of the United States District Court and a remand of this case for a full trial on the merits.

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